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No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE AND NICHOLAS J. BARNES,
PETITIONERS

v.

FEDERAL POWER COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 394 F. 2d 16. The opinion of the Federal Power Commission (C.A. App. 1–33)[1] is reported at 36 FPC 927. The Commission's order denying petitioners' application for rehearing and motion for a stay (C.A. App. 41–42) is reported at 37 FPC 257.

JURISDICTION

The judgment of the court of appeals was entered April 5, 1968. Petitions for rehearing and for rehear-

[1] The Commission and intervenor Commonwealth Edison Company filed a joint appendix below (hereafter "J.A."), and petitioners filed a separate appendix (hereafter "C.A. App.").

ing *en banc* were denied, respectively, on May 21 and May 28, 1968. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until September 10, 1968, and the petition was filed September 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as amended, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the order of the Federal Power Commission authorizing the merger of Central Illinois Electric and Gas Company into Commonwealth Edison Company, as "consistent with the public interest" under Section 203 of the Federal Power Act, was supported by substantial evidence.

STATUTE INVOLVED

Section 203 of the Federal Power Act, 16 U.S.C. 824b, provides:

> SEC. 203. (a) No public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which

the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

STATEMENT

On March 2, 1966, Commonwealth Edison Company (Commonwealth) and Central Illinois Electric and Gas Company (Central) filed an application with the Commission seeking authority to merge Central into Commonwealth in accordance with Section 203 of the Federal Power Act, 16 U.S.C. 824b. After a hearing in which special provision was made for petitioners to participate at minimum expense, the Commission found that the merger was "consistent with the public interest" as required by Section 203, and authorized the merger.[2] The merger has been consummated.

[2] The merger was also approved by the Illinois Commerce Commission on April 27, 1966 (C.A. App. 11; 36 FPC at 929).

Background of the merger.—Commonwealth is a vertically integrated utility that supplies electric power at wholesale and, through its distribution system, at retail. Prior to the merger, it operated in Chicago and the rest of the northern third of Illinois, except for the area served by Central's Rockford Division. It was (and remains) the third largest of 211 major privately-owned utilities (FPC Classes A & B)[3] in the United States (C.A. App. 23; 36 FPC at 941). Commonwealth has had extensive interconnections with unaffiliated electric systems since the 1920's (J.A. 45–46; C.A. App. 9; 36 FPC at 933). In recent years Commonwealth has been able to build and plan for large-size generating units of 600,000 kw or larger. Commonwealth showed that a 600,000 kw unit costs 27 percent less per kw than a 100,000 kw unit (J.A. 39–42; C.A. App. 9–10; 36 FPC at 933–934).

Central, prior to the merger, was a considerably smaller combination utility system serving at retail 94,468 electric and 87,227 gas customers in several widely scattered areas in Illinois (C.A. App. 8; 36 FPC at 933).[4] About 78 percent of Central's electric

[3] Class A electric utilities are those which have annual electric revenues of $2,500,000 or more. Class B electric utilities have electric revenues between $1,000,000 and $2,500,000 as defined in the Commission's Uniform System of Accounts for Public Utilities and Licensees. (18 C.F.R. 101.)

[4] The scattered nature of the Central system (and of other Illinois utilities) was the product of the simplification of the old Consolidated Electric and Gas holding company system, approved in 1944 by the S.E.C. in *Consolidated Electric and Gas Co., et al.*, 15 SEC 386. Central had held Consolidated's Illinois properties and was allowed to retain them as an independent company.

customers and 81 percent of its gas customers were in the Rockford area, surrounded on three sides by Commonwealth's service area. In addition, it operated electric distribution properties in three isolated pockets in central Illinois, and another tiny pocket in southeastern Illinois. (*Ibid.*)

The major reason for Central's interest in merger with Commonwealth was its anticipated need for an increased power supply. Central estimated that its total system demand for electric power in 1971 would be 300,000 kw, an increase of 49.3 percent over 1965 (C.A. App. 12; 36 FPC at 935). Central considered several possible programs for satisfying this need. Following unsuccessful attempts to join with neighboring systems (other than Commonwealth) in the construction of jointly owned units, Central's engineering consultant made a study suggesting two other approaches (J.A. 9–28; C.A. App. 13–14; 36 FPC at 935–936). One of these approaches involved the construction of independent facilities by Central and the other the purchase of power from Commonwealth at a rate based on Commonwealth's average costs (a rate viewed as reasonable by the Commission) (C.A. App. 13; 36 FPC at 936).

It turned out, however, that still a third approach —merger with Commonwealth—would provide the most economical source of power for Central's area. Although the program of self-generation by Central would have been more than $3,000,000 cheaper than purchase of electricity from Commonwealth over a 10-year period (*ibid.*), merger would give a source of power estimated to be $13,000,000 cheaper than the self-

generation program over the same period (C.A. App. 13; 36 FPC at 935).[5]

The Commission proceedings.—There were only two intervenors before the Commission: petitioners in opposition to the merger, and the City of Rockford, Illinois, in spport of it.[6] On June 3, 1966 (C.A. App. 34–35; 35 FPC 877), the Commission specified that the parties should address themselves in particular to the comparative advantages and disadvantages of merged operations as contrasted with continued nonaffiliation supplemented by greater electrical coordination. The hearings spanned several days and covered the questions specified in the Commission's order as well as other matters raised by the Commission's

[5] One of Commonwealth's witnesses explained the reason for the difference between the post merger results and Plan I (additional purchases from Commonwealth) (J.A. 64): "This approach reflects the economic effect of the merger on the two companies combined rather than the individual effects on each company. Costs to Central in the without-merger case would actually be higher than assumed in the base case, since that case assumes that the capacity and energy required to supplement Central's own generation would be available at Edison's incremental cost; Central would [absent merger] obviously have to pay a higher price for such capacity and energy."

[6] Rockford did not participate beyond a prehearing conference. It had apparently been concerned over the possible loss of corporate tax revenues theretofore paid by Central which would follow a shift of corporate headquarters from Rockford to Chicago. But it announced that it had reached a settlement and thereafter took no further part in the proceedings (R. 57–61), and favored the merger since it eliminated any need for Central to build a new generating plant near the city, where the bulk of Central's customers were concentrated (C.A. App. 13; 36 FPC at 935).

staff as a result of its field investigation into the companies' offices and facilities and adjacent bulk power systems. The staff introduced a number of exhibits and conducted extensive cross-examination; in addition, since petitioners' counsel were not able to be present, they were permitted to cross-examine by written interrogatories (J.A. 95–151). On August 19, 1966, the Commission granted applicants' unopposed request for waiver of an intermediate decision by the examiner (36 FPC at 482).

The Commission decision.—On December 2, 1966, the Commission, in a comprehensive opinion (C.A. App. 1–33; 36 FPC 927–946) reviewing both legal and policy standards applicable to utility mergers, approved the merger, but retained jurisdiction to require Commonwealth to demonstrate within three years why it should not be compelled to divest itself of control over Central's isolated electric properties and its gas properties (C.A. App. 25–27; 36 FPC 942–943).

The Commission viewed the basic criterion for measuring whether a particular merger would be "consistent with the public interest" [1] to be whether it would be compatible with the Federal Power Act's goal of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with * * * the proper utilization and conservation of natural resources * * *" [2] (C.A. App. 5; 36 FPC at 931). The Commission noted C.A. App. 3; 36 FPC 930):

[1] Section 203(a), 16 U.S.C. 824b(a).

[2] Section 202(a), 16 U.S.C. 824a(a).

> The touchstone of successful operation in today's electric power industry is the coordination of operating facilities to achieve the full economies of scale made possible by advancing technology. There are several ways in which the advantages of coordination may be realized, merger being but one of them. * * *

The Commission expressly recognized that the "public interest" standard also requires evaluation of the proposed merger's consistency with the entire Public Utility Act of 1935 consisting of both the Federal Power Act (16 U.S.C. 791a–825r) and the Public Utility Holding Company Act (15 U.S.C. 79 *et seq.*) (C.A. App. 5–6; 36 FPC at 931–932).

In making its overall assessment, the Commission enumerated six separate factors of special significance: (1) the economic effect of the merger on operating costs and rates; (2) reasonableness of the purchase price; (3) anticipated accounting treatment; (4) voluntariness of the participation of the acquired utility; (5) impact on existing and potential competition; and (6) consistency with effective federal and state regulation over operations and rates (C.A. App. 7; 36 FPC at 932). The proposed merger was found to comport with the public interest, as gauged by each of these criteria, as follows:

(1) While relatively small systems may in some situations be able to share fully in the economies of scale simply by coordination with other systems, here a merger would achieve substantial bulk power economies ($13 million) beyond those possible for Central as a separate entity even with maximum feasible coor-

dination (C.A. App. 4; 36 FPC at 930–931). Merger would further permit annual savings of about $2,400,000 through payroll and administrative cost reductions and through replacement of Central's preferred stock with debt capitalization. The immediate post-merger period would bring a rate reduction—already approved by the Illinois Commission—aggregating $270,000 annually for Central's customers (C.A. App. 17–19); 36 FPC at 937–938). The Commission also found that further reductions in the future appeared likely by reason of the cost savings resulting from the merger (J.A. 85; C.A. App. 20–21; 36 FPC at 938–940).

(2) Although the purchase price for Central's shares was set at $24 million over their market value, the figure agreed upon was the fair result of arms-length bargaining, and reflected a reasonable adjustment for long-term growth and economies of scale (C.A. App. 16; 36 FPC at 937).

(3) The proposed merger involved an exchange of stock and the capitalization of the resulting entity would not exceed the aggregate capitalization of the two applicants. Since the amount of the payment above Central's book value would be charged against Commonwealth's stock and surplus accounts, there would be no effect upon the ultimate consumers of either utility. This treatment was found to be in accordance with sound accounting principles and with the requirements of the Commission's Uniform System of Accounts (*ibid.*).

(4) While Commonwealth had the power as the dominant utility in northern Illinois to inhibit Cen-

tral's efforts to secure meaningful interconnection, Commonwealth had not in fact retarded Central's efforts to achieve savings through coordination with its neighbors and had not in any way coerced Central into the merger (C.A. App. 21–22; 36 FPC at 940).

(5) Nor was any adverse effect on the competitive situation found. Since both Commonwealth and Central sold electricity to retail consumers only within their own franchised areas, and since Central had no significant wholesale sales or capacity, they were not in direct competition. The Commission further found that the merger of these two companies would not (a) result in any significantly increased concentration of economic power; (b) eliminate potential competition either directly or in attraction of new industries to their respective service areas; or (c) have an adverse effect on competing energy sources (C.A. App. 22–23; 36 FPC at 940-941).

(6) Finally, the integration of facilities would not lessen the ability of the Illinois Commerce Commission to continue to regulate effectively the rates to be charged by Commonwealth to the various customers of the combined systems (C.A. App. 25; 36 FPC at 942).

In appraising the scope of the merger, the Commission recognized that Commonwealth had been solely an electric utility (which had previously spun off its gas properties) and was limited to a physically integrated service area, while Central had some isolated electric properties as well as major gas properties. Although there had been no demonstration that it would be consistent with the public interest for the

merged company to retain these properties permanently, the Commission concluded that the final determination of the propriety of Commonwealth's continued operation of these facilities need not be a condition precedent to the approval of the merger. Indeed, the Commission found that the merger would not have been feasible if it had not initially included the transfer of the gas and non-contiguous electric facilities (C.A. App. 27; 36 FPC at 943).

Accordingly, as a condition to approving the merger, the Commission expressly retained jurisdiction to make future determinations with respect to the gas and isolated electric properties, and directed the merged company to show, not later than December 1, 1969, either why it should be allowed to continue to operate such properties, or what its plans were for disposition of them.* (C.A. App. 25–27, 31; 36 FPC at 942–943, 945).

Further proceedings.—On January 3, 1967, petitioners sought rehearing and a stay of the merger (R. 1943–1956). The Commission denied these requests on January 30, 1967 (C.A. App. 41–42; 37 FPC 257–258).

On review, the court of appeals held alternatively (1) that petitioners were not aggrieved within the meaning of Section 313(b) of the Federal Power Act,

*On November 24, 1967, Commonwealth reported that it had approached twelve electric and gas companies about a possible exchange of the gas and non-contiguous electric properties or some other disposition thereof, and that discussions with interested parties were in progress.

16 U.S.C. 825*l*(b) (Pet. App. 3–7),[10] and (2) that, in any event, the Commission's findings were adequately supported by the record and consistent with the applicable legal criteria. Concluding that the public interest had been "faithfully protected," the court affirmed the Commission's order (Pet. App. 7–8). Petitioners' motion for a remand to adduce additional evidence was denied (Pet. App. 8).

ARGUMENT

In fulfilling its responsibility under Section 203(a) of the Federal Power Act to determine whether proposed consolidations are "consistent with the public interest", the Federal Power Commission has evolved several pertinent criteria. Applying these criteria, the Commission found that the merger of Central into Commonwealth would result in substantial economies in supplying bulk power needed to meet load growth in Central's area and would facilitate rate reductions. Nothing in the policies of the Federal Power Act, the antitrust laws, or the Public Utility Holding Company Act was found to outweigh the advantages flowing from merger. The Commission's conclusions were rationally based and buttressed by findings amply supported by the record.

As the court of appeals recognized, the primary responsibility for measuring whether a proposed merger in a regulated industry is compatible with the

[10] The Commission did not below, and does not now, urge this ground. Indeed, since the court did in fact reach and pass upon the merits, the standing question sought to be raised (Pet. 2, 5) is academic.

public interest rests on the appropriate administrative agency. Having found that the Commission acted in accordance with proper legal standards and on the basis of substantiated findings, the court below properly affirmed the Commission's decision. See *Penn-Central Merger Cases*, 389 U.S. 486, 498–499.

Except for the standing point—which need not be considered here because the court of appeals also reviewed the case on the merits—the multifarious questions formulated in the petition (Pet. 2–6) are reducible to the final question framed: "Was the [Commission's] order contrary to the evidence?" Such questions as are raised in the petition as to the substantiality of evidence and the relative weight to be given to the various factual elements of an administrative proceeding do not present issues appropriate for plenary attention by this Court. Beyond these objections, the petition raises no issue of public importance, and points to no relevant conflict of decisions. Hence, further review is not warranted.

1. We discuss only briefly the arguments petitioners have advanced to support their request for review. First, as the court below recognized (Pet. App. 6), petitioners are doubly in error in complaining (Pet. 13–16) that the consideration given for Central stock was excessive. The price paid fairly reflects the book value of Central's plant taken together with its sales growth potential and anticipated economies of scale. Moreover, the payment of the purchase price in stock having a market value higher than the depreciated original cost of the Central properties could in no way burden the consumers of either system. The

cost of Central's assets on Commonwealth's books is identical with their premerger cost on Central books; adjustments have been made only in Commonwealth's stock and capital surplus accounts and the total capitalization of the merged company will not exceed the aggregate capitalization of Central and Commonwealth (C.A. App. 16; 36 FPC at 937).

2. The court below properly denied petitioners' motion to remand to permit them to adduce additional evidence. Petitioners chose to participate in the proceedings only to the extent of submitting interrogatories by way of cross-examination. But this is no reason why they could not have offered, during the hearings, evidence relating to the very matters referred to in the motion. In any event, as the Commission's opinion reveals, the petition to remand (see Pet. 5) does little more than repeat claims advanced to the Commission at various stages of the proceedings. These claims were considered by the Commission on the basis of substantial evidence developed by the applicants and the staff (after its field investigation), none of which is here challenged.[11]

[11] The only specific data included in the motion were tables intended to show that the retail rates and average revenue of large utilities, including Commonwealth, were frequently higher than those of smaller utilities. But the Commission did consider at length the relative rates of both Commonwealth and Central and expressly took into account that Commonwealth's rates in some categories were higher than those of Central, though overall there was little difference (C.A. App. 19–21; 36 FPC at 938–940); petitioners do not challenge the bulk power savings found to exist here.

Petitioners' assertion that the merger would result in in-

3. Insofar as petitioners seek to suggest (Pet. 16–19) that the Commission failed to take proper account of antitrust laws and policies, their contentions are baseless. Contrary to any such claim the Commission was acutely aware that the policies of the antitrust laws and the Public Utility Holding Company Act constitute an important ingredient of the "public interest."[12] Assessment of the proper impact of these principles on electric utilities calls for the exercise of expert judgment by the agency entrusted by Congress with the comprehensive task of regulating this industry. In so doing, that agency must also give effect

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creased air pollution in Chicago was made for the first time in petitioners' brief to the court below and hence its claim that the Commission failed to take this into consideration is not open here. See Section 313(b) of the Power Act, 16 U.S.C. 825*l* (b). In any event, the claim that the merger will increase coal-fired generation in Chicago is without substance. Commonwealth's construction plans (which, we point out, are not significantly affected by the merger) included no fossil fuel plants in or near Chicago. Two 600 mw units were under construction or on order and two 800 mw nuclear units were planned for later construction (C.A. App. 9–10; 36 FPC at 933–934). The 600 mw units are mine-mouth coal-fueled facilities located 175 miles southwest of Chicago and the energy will be carried to Chicago over 345 kv lines (J.A. 39–40). (Commonwealth is also planning another coal-fueled plant as a possible alternative to a nuclear unit, but this, too, will be remote from Chicago, at a site in southern Illinois. See *The Wall Street Journal* of September 19, 1968, p. 8).

[12] Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 484–485; *Atlantic Seaboard Corp.* v. *Federal Power Commission* (C.A. D.C. No. 21409, September 27, 1968) (slip op. p. 7 n. 10); see, also, *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243–246; *Penn-Central Merger Cases*, *supra*, 389 U.S. at 498–502; *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 156; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79.

to the policies of the regulatory statute it administers. Thus, in defining the policy of the Federal Power Act to assure abundant electric energy with the lowest possible rates to consumers, Congress has expressly recognized that an appropriate method for achieving economies of scale in bulk power supply is to allow, encourage, and regulate coordination of power supply facilities.[18] See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234–235 (C.A.D.C.), affirmed, 343 U.S. 414. It was in this context that the Commission emphasized that whether a merger is the most appropriate form of coordination of systems turns on the peculiar facts of each specific situation and will be closely scrutinized (C.A. App. 3–5; 36 FPC at 930–931).

In making this inquiry in this case, the Commission acknowledged that economies of scale may be achieved by coordination between otherwise independent power systems and not only by corporate integration. The record here showed, however, that the coordination reasonably available to Central as a separate company would fall short by $13 million (over a 10-year period) of achieving the economies of scale that will result from the merger. See, pp. 5-6, 8-9, *supra*. Correspondingly, the Commission concluded that the economies in supplying bulk power resulting from the merger would make it possible for the Illinois Commerce Commission to effect significantly greater rate

[18] Section 202(a) of the Act, 16 U.S.C. 824a(a), directs the Commission to "promote and encourage such interconnection and coordination" of facilities for the generation, transmission, and sale of electric energy.

reductions for Central's customers than if Central remained independent (C.A. App. 21; 36 FPC at 940).

4. In addition, the Commission accurately found that the merger would have no substantial anti-competitive consequences (C.A. App. 22–24; 36 FPC at 940–942). The two companies were not in competition in any real sense: Central had no wholesale sales except for some limited interchanges with Commonwealth; and the franchised retail service areas of the two companies were distinct in accordance with state law. Furthermore, since Commonwealth's industrial rates were lower than Central's, there was no serious competition in attracting new industrial customers to their respective service areas. Indeed, the City of Rockford's ability to attract industry is probably enhanced by the economies that will result from the merger. Moreover, in light of the existing degree of concentration and the sizes of the two companies, the Commission reasonably concluded that Commonwealth's economic power would not be significantly increased by the merger, either in relative or absolute terms (C.A. App. 22–24; 36 FPC at 940–942).

The record also supports the Commission's finding (C.A. App. 24, 31; 36 FPC at 941–942, 945) that the merger would have no adverse effect on competition with other energy sources. Central, to be sure, owned gas distribution properties which were included in the merger, and Commonwealth, which previously controlled no gas properties of its own, intended to continue Central's practice of using excess gas as boiler fuel in its steam generators. As a practical

matter, the merger with its attendant economic benefits would not have been feasible if these properties were not initially included in the transfer. It was within the Commission's sound discretion to conclude that any divestiture of the acquired gas and noncontiguous electric properties should be delayed pending further study of the alternatives. Compare *Denver & Rio Grande Western Railroad Co.* v. *United States*, 387 U.S. 485.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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